89-750

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT W. WILLS,
Petitioner,
v.
THE DEPARTMENT OF THE NAVY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT W. WILLS
6653 CHILTON COURT
McLEAN, VIRGINIA
22101
(703) 356-9330
Pro Se Petitioner

PETITION FOR WRIT OF CERTIORARI
TO
THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

QUESTIONS PRESENTED

1. Did respondent's procedures for employee separation deprive petitioner of due process and equal protection of the law in violation of 5 USC 2301(b)(2) and the fifth and fourteenth amendments to the constitution?

2. Did respondents deprive petitioner of a relevant (clean) personnel record in violation of statute 5 USC 552a(e)(1), rules and regulations CCPO INSTR 12432.1 and FPM Supplement 296-33 Subchapter 30?

3. Did U.S. Court of Appeals for the Federal Circuit depart from accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of supervisory power by the Supreme Court of the United States?

DESIGNATION OF PARTIES

The parties to the appeal before the U.S. Court of Appeals for the Federal Circuit were Petitioner Robert W. Wills and the Respondent, Margaret L. Baskette, The U.S. Department of Justice, (Civil Division).

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit was not issued and not documented for publication for WILLS v. NAVY Case No. 89-3214 docked 16 March 1989, (MSPB No. DC07528710415-1). A judgement was issued on 28 Aug 1989 without opinion. Denial of a Petition for Rehearing was issued on 19 Sep 1989 without opinion.

The opinions and orders of the Merit Systems Protection Board (MSPB) are constructed by Appendices I, II and III, infra .

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked pursuant to Rule 17 of the Supreme Court of the United States effective 30 Jun 1980.

UNITED STATES CONSTITUTIONAL PROVISIONS, UNITED STATES STATUTES, AND RULES OF COURT INVOLVED

The U.S. Constitutional Provisions, Statutes, and Rules of Court are:

CONSTITUTIONAL:

AMENDMENT V

No person shall hold to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the previleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES:

5 USC 552a(d)(2)(A)

(2) permit the individual to request amendment of a record pertaining to him and -
(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request acknowledge in writing such receipt; and

5 USC 552a(d)(2)(B)(ii)

(B) promptly, either -

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency , and the name and business address of that official;

5 USC 552a (e)(1)

(e) Agency requirements

Each agency that maintains a system of records shall -

(1) Maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

5 USC 2301(b)(2)

All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or handicapping condition, and with proper regard for their privacy and constitutional rights.

5 USC 7701(d)(2)

The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule or regulation under the jurisdiction of the office is at issue in any proceeding under this section.

5 USC 7703(c)

In any case filed in the U.S. Court of Appeals, the court shall review the record and hold unlawful and set aside any agency action,

finding, or conclusions found to be -

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

RULES OF COURT:

U.S. Supreme Court

Rule 17

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a

way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

.....

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the U.S. Court of Appeals for the Federal Circuit, Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

U.S. Court of Appeals for Federal Circuit
Rule 8

(Guide for Pro Se Petitioners (Fed Cir Rules p.73 of 1 May 1989)

8. Cases dismissed for lack of jurisdiction or for untimeliness.-- If the board, commision, or trial court dismissed your case for lack of jurisdiction or because you did not file on time, you must limit your petition for review or

appeal to these issues. In that situation, this court will not consider the merits of your case (whether you deserve to win or lose your case on the facts and the law) and if this court were to reverse the board, commission, or trial court on its jurisdictional or timeliness ruling, your case would be remanded to the board, commission, or trial court to consider the merits. If jurisdiction or timeliness was the basis of the decision you are appealing, you will waste your time and effort, and will unduly burden this court, if you discuss the merits.

U.S. Court of Appeals for the Federal Circuit

Rule 19

(Guide for Pro Se Petitioners (Fed Cir Rules p.75 of 1 May 1989)

19. Notice of the court's decision.-- You will be sent a copy of the court's opinion in your case by mail on the day it is filed with the clerk. If you file a petition for rehearing, it must be received within 14 days of .....

6. Exclusions. The following actions are excluded from the provisions of this instruction: .....

g. A voluntary action initiated by the employee

h. An adverse action for cause

FPM SUPPLEMENT 296-33
SUBCHAPTER 30. RETIREMENTS

S30-2b.(2) Agency Finding. When the employee is serving on an appointment that does not afford him/her appeal rights (for example, a nonveteran who is serving on an Excepted Appointment), no agency finding or reasons for or explanation of the retirement may be palced on the SF52, SF50, SF7, or in the employee's OPF/MRPF or EPF. When the employee does have appeal rights, follow the instructions below to document the agency finding.

(a) Disability Retirements .....

(b) Other Retirements

(iii) When an employee retires after receiving written notice of a proposed disciplinary or adverse action, the pending action must be listed as the agency finding ("Retired after receiving written notice of ....")

STATEMENT OF CASE

On 11 Sept 1985, WILLS submitted retirement papers and departed his civilian job with Naval Air Systems Command after 33 years of loyal and dedicated federal service as an aerospace engineer. He had worked his way up to Branch Head (GM15) with 29 years in the same organization.

In Mar 1985, WILLS was accused of unsatisfactory job performance by his Division Director (A Navy Captain temporarily assuming role of supervisor). WILLS had a reputation of supporting his employees. One controversy involved a GS4 clerk typist that had been in the branch for more than 4 years before WILLS became Branch Head. WILLS had always considered this employee's performance satisfactory for a GS4 rating but not worthy of advancement to a higher rating. This employee had earned her keeps on many occasions. Top notch secretaries were not available. The Navy Captain, without knowledge and appreciation for past efforts, faulted WILLS for not having built a better case against this employee for

removal (he wanted an excuse to get WILLS). This Captain had refused awards for two top notch engineers that WILLS had rated as Outstanding. They left and WILLS was doing their work. It became convenient and entertaining for the Captain to remove WILLS. (Captain's personal life was a mess-alcohol dry-out tank at Norfolk-separation-a girl friend on the West Coast- at least 2 bicycle wrecks requiring days off from work-he remarked to WILLS that bicycle was intoxicated-a reputation of trouble maker at each duty station). For 90 days WILLS was put on a double duty treadmill under the pretense of an opportunity to show improved job performance. WILLS met all of his unreasonable demands and special assignments. WILLS provided evidence that his performance was above standards as in previous 3 years confirmed by this same Captain thereby making the allegations against him false. The Captain did not relent. WILLS then filed a grievance against the Captain pointing-out his errors and detrimental impact on branch responsibilities. (For one thing, he violated ethics code by asking Branch Heads to solicit airplane models from contractors for his office) The merits of this grievance were ignored (Captain is a Naval Academy graduate).

After receiving the Captain's Notice of Proposed Removal, counsel for WILLS submitted a rebuttal showing that agency did not have any legal basis for WILLS' removal. The merits of this rebuttal were ignored. WILLS was notified that he would be separated on 13 Sept 85.

By retiring two days prior to being fired, WILLS had a right to a clean record. Sole purpose of Civil Service Reform Act of 1978 is to make it easy to get employee out of job. If he goes voluntarily, statute has been satisfied and does not call for adverse action against employee's record. If forced removal becomes effective, agency has a right to dishonor employee's personnel record since employee also has an appeal right to MSPB.

WILLS' retirement was classified as "voluntary" without an appeal right. Agency representatives had informed WILLS that a "voluntary" retirement would not have an appeal right. These representatives did not tell WILLS that his retirement would also be considered by agency to be a disciplinary or adverse action requiring his record to be

dishonored after his departure. Had WILLS known what the agency intended to do, he could have made an informed choice concerning his retirement action and need for an appeal to clear his record but WILLS was not informed.

By not informing WILLS, his "voluntary retirement" was actually an "involuntary action". An "involuntary action" is tantamount to removal which is appealable. At the time, WILLS did not know that an involuntary action was appealable. It took WILLS until 20 May 87 (20 months) to find out that his "voluntary" retirement was tantamount to an "involuntary action". WILLS submitted his appeal to MSPB on 18 Jun 87, less than one month after finding out that he had a legal basis for an appeal.

Agency claimed that dishonored record was required by OPM personnel manual. WILLS claimed that this manual applies only to employees requiring disciplinary action that is appealable. MSPB is required by statute to promptly notify OPM whenever interpretation

of a manual is at issue. Instead, MSPB accepted agency's claim, without any statutory proof, that the dishonoring of WILLS' personnel record was appropriate. MSPB accused WILLS of a false assumption that there would be a clean record. MSPB claimed that agency had no way of knowing that WILLS was relying on false assumption and therefore WILLS' retirement was "voluntary". WILLS did not rely on false assumption since rules and regulations do not require a dishonored record for a voluntary retirement free of disciplinary action. WILLS did not have to express an assumption or broach subject of a clean record to agency personnel since WILLS had no way of knowing that agency would misinterpret rules and regulations after his departure. WILLS had a right to assume that agency would be procedurally correct with matters affecting his record. Knowledge was imparted to agency that WILLS wanted to preserve his clean record by his act of submitting retirement papers two days prior to effective day for removal. WILLS was not required by regulation to impart this

knowledge in any other manner. This case is significant and important since this false interpretation of manual probably impacts other cases administered by the agency.

MSPB ruled lack of jurisdiction due to a "voluntary retirement" thereby ignoring WILLS' claim to a clean record and due process. MSPB also ruled "lack of prudence" leading to untimeliness for filing the appeal. WILLS did not contact agency immediately upon receipt of dishonored record since agency representatives had told him that he did not have an appeal right. When WILLS did contact agency later on 2 Mar 87, his request for a clean record was ignored. WILLS did not immediately contact his previous attorney since he could not take legal action if he did not have an appeal right. For same reason, WILLS did not contact MSPB since he was not aware of an appeal right at that time. WILLS did the only thing that he knew to do. He contacted his congressman which was slow but effective. Therefore, WILLS showed good cause for the amount of time it took to become aware that he had a

legal basis for filing an appeal. MSPB decisions on jurisdiction and untimeliness are not supported by statutes, rules or regulations thereby violating WILLS' right to due process and equal protection of the law.

By petition to U.S. Court of Appeals for the Federal Circuit, with U.S. Department of Justice as respondent, WILLS provided evidence that lower court (MSPB) did not comply with statute, rules or regulations and that his rights were violated. WILLS requested remand of his case to MSPB for a fair hearing on merits and substance since he had not previously received an opportunity to make informed choice for an appeal during his retirement proceedings. The lower court's decisions were affirmed without opinion.

With this writ, WILLS is requesting the U.S. Supreme Court to confirm, secure and restore his rights as provided by statute and amendments to the constitution.

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. RESPONDENTS DEPRIVED PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW AS SECURED TO HIM BY 5 USC 2301(b)(2) AND THE FIFTH AND FOURTEENTH AMENDENTS TO THE CONSTITUTION.

With entitlement to relief under 5 USC 2301(b)(2) and the fifth and fourteenth amendments, WILLS showed: (a) that respondents deprived him of a right secured to him by the constitution or federal law and (b) that the deprivations resulted from erroneous interpretations, decisions and misapplication of the statute, rules and regulations.

WILLS was not given an opportunity, at time of his employment termination, to make an informed choice concerning his right to an appeal to clear his name and personnel record (SF50). WILLS had received agency's Notice of Decision on 6 Sept 85 to be separated from employment effective 13 Sept 85. Although agency's Notice of Decision gave WILLS the opportunity to appeal substance of the agency decision as to his performance (within 20 days after separation), neither the written decision nor the personnel instructions it cited (CCPO INSTR 12432.1) gave notice that if WILLS did not appeal (after separation), but retired (before separation), the substance of the agency finding would be memorialized forever on the record without any requirement by the agency to prove the truth of its finding nor any opportunity by WILLS to contest it.

WILLS, only after being separated, could exercise an appeal right with MSPB on the substance of his performance (Civil Service Reform Act of 1978). Instead, WILLS submitted retirement papers and departed on

11 Sept 85. WILLS wanted to preserve his clean record since he still needed to work within the aerospace industry. By leaving two days prior to being fired, WILLS exercised a retirement option fully earned after 33 years of loyal and dedicated federal service.

Respondents did not let WILLS retire in peace. Respondents claimed a right to impose an agency finding that dishonored and disgraced WILLS' record (SF50) after his departure from the job. Imposing this agency finding violated CCPO INSTR 12432.1. Para 6.g states that "a voluntary action initiated by the employee" is excluded from the provisions of this instruction which is the agency's regulation for enforcing the 1978 statute. Since WILLS initiated voluntary retirement action, a derogatory or adverse agency finding or further negative action against WILLS was neither required by statute nor instruction. Imposing an adverse agency finding, without his knowledge, violated WILLS' right to fair and equitable treatment without proper regard

for his privacy and constitutional rights, 5 USC 2301(b)(2). WILLS' retirement was involuntary because he involuntarily accepted the agency's terms; he never voluntarily accepted agency terms of retirement that included adverse and discrediting comments on his SF50.

Had WILLS been informed of forthcoming discrediting agency finding prior to employment termination, he could have made an informed choice for his right to an appeal on substance with MSPB. WILLS did not have to allege that agency intentionally misled him. Beatty v. Department of agriculure 24 MSPR 658, 662 (1984). Agency had a duty to inform WILLS of its discrediting agency finding. Doe v. United States 753 F.2d 1092, 1106 (D.C Cir 1985). "A decision made...based on misinformation or a lack of information, can not be binding as a matter of fundamental fairness and due process". Covington v. Department of Health and Human Services 750 F.2d, 943 (Fed Cir 1984.

By not informing WILLS of agency finding and in violation of instruction, WILLS' retirement was therefore involuntary, tantamount to removal. A retirement is involuntary if it is obtained by agency misinformation or deception. Scharf v. Department of the Air Force 710 F.2d, 1572, 1574-75 (Fed Cir 1983). Wills showed that he was deceived thereby making his retirement "involuntary". The touchstone of analysis of whether a retirement is voluntary is whether the employee made an informed choice. Covington 750 F.2d at 941-42. WILLS showed that he did not have an opportunity to make an informed choice. WILLS' right to an informed choice and due process was not protected by the respondents.

2. RESPONDENTS DEPRIVED PETITIONER OF A RELEVANT (CLEAN) PERSONNEL RECORD IN VIOLATION OF 5 USC 552a(e)(1), CCPO INSTR 12432.1 AND FPM SUPPLEMENT 296-33 SUBCHAPTER 30.

Agency's finding to dishonor and disgrace WILLS' personnel record violated 5 USC 552a(e)(1) since respondents did not establish a legal or necessary purpose to be accomplished by statute or by executive order.

WILLS was separated under provisions of CCPO INSTR 12432.1 for alleged unsatisfactory job performance. WILLS was not separated for alleged "adverse cause" or "disciplinary action"

involving a different instruction, rules and regulations. CCPO INSTR 12432.1 para 6.h excludes actions for "adverse cause" from these provisions dealing with unsatisfactory performance. In violation of para 6.h, agency related WILLS' retirement to an "adverse cause" action as regulated by FPM Supplement 296-33, Subchapter 30-2(2). An agency finding is applied to an employee's record when an employee is removed or separated for "adverse cause" or "disciplinary action" and the finding is required to accomplish a purpose required by statute. Respondents violated WILLS' right to a relevant (clean) record since there was no statutory purpose to be accomplished by adding adverse agency finding to his record after his voluntary departure.

Agency classified and accepted WILLS' departure as "voluntary retirement" and then proceeded to imposed an agency finding associated with an adverse separation but failed to inform WILLS that he was entitled to an appeal right inherent with an adverse action. WILLS had properly understood that he

did not have an appeal right with a classification of "voluntary retirement" since agency representatives had so informed him. WILLS did not know that his "voluntary retirement" was tantamount to an "involuntary action" and therefore appealable.

On 2 Mar 87, WILLS formally requested agency to remove adverse agency finding from his record. Agency ignored his request in violation of 5 USC 552a(d)(2)(A). On 20 May 87, WILLS became aware that an "involuntary retirement" action was appealable. WILLS filed an appeal with MSPB on 18 Jun 87. In Dec 87, agency formally replied and refused to amend WILLS' record and also proceeded to violate 5 USC552a(d)(2)(B)(ii) by not establishing procedures for WILLS to request a review of that refusal. Agency used FPM Supplement 296-33, Subchapter 30 as justification for refusal to amend WILLS' record but did not establish purpose required by statute. MSPB accepted respondent's claim that agency finding was appropriate. This acceptance violated 5 USC 7701(d)(2) which states: "The Board shall

promptly notify the director whenever the interpretation of any civil service law, rule or regulation under the jurisdiction of the office is at issue in any proceeding under this section." MSPB did not seek OPM intervention. This violation in procedures had a negative impact on the outcome of petitioner's case since OPM is the appropriate expert on FPM Subchapter 30 issues. Accordingly, a *Brief of Amicus Curiae* by Mr. Timothy M. Dirks (OPM) in accordance with Rule 36, would serve as a review of government policy for SF50 procedures.

3. THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT DEPARTED FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY LOWER COURT, AS TO CALL FOR EXERCISE OF SUPERVISORY POWER BY THE SUPREME COURT OF THE UNITED STATES.

The appeals court violated 5 USC 7703(c) by not upholding statute, rules or regulations

shown to be violated by respondent. The appeals court did not set aside agency action, agency finding, or MSPB conclusions shown to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.

Also, appeal court Judges (Markey, Newman, Archer) deprived petitioner of due process and equal protection of law by violating their very own court procedures established for pro se petitioner as guidelines and ground rules which resulted in a significant impact on the out come of petitioner's case.

Petition to appeals court involved two issues and decisions of lower court: (1) jurisdiction and (2) timeliness of appeal, which were briefed. During oral argument on 2 Aug 88, WILLS was not asked questions on issues briefed but rather questions with implications on whether WILLS was guilty on the merits or

substance of the case. These questions violated ground rule no. 8 which specifically warns the petitioner that only issues under review are to be discussed. This violation clearly prejudiced the case against the petitioner. WILLS' petition for a rehearing respectfully requested Chief Judge Markey to withdraw from the case. The petition for a rehearing was denied without opinion or explanation.

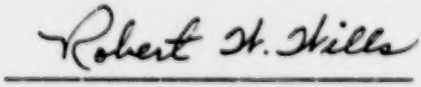
Ground rule no. 19 was also violated by the court. This ground rule specifically states that the court will provide an opinion to the pro se petitioner. The court issued a judgement against the petitioner without the issuance of an opinion.

These violations by Judges Markey, Newman and Archer deprived WILLS of due process and fair and equitable treatment under statute and fifth and fourteenth amendments to the constitution requiring the exercise of supervisory power by the Supreme Court of the United States.

CONCLUSIONS

WILLS did not receive due process and fair or equitable treatment in view of violations of statute, rules and regulations. The Naval Air Systems Command, MSPB, The U.S. Department of Justice and U.S. Court of Appeals for the Federal Circuit did not uphold petitioner's rights as secured by statute and amendments to the U.S. Constitution. A *Brief of Amicus Curiae* by Mr. Timothy M. Dirks (OPM), in accordance with Rule 36, would review government policy on SF50 procedures.

Respectfully submitted,



Robert W. Wills
Pro Se Petitioner
6653 Chilton Court
McLean, Virginia
22101
(703) 356-9330

APPENDICES

APPENDIX I

U.S. COURT OF APEALS FOR THE FEDERAL CIRCUIT

No. 89-3214

Robert W. Wills,

Petitioner

v.

Department of the Navy,

Respondent

Robert W. Wills, Pro Se Petitioner

Margaret L. Baskette, Department of Justice, Respondent

Docked: 16Mar 89

Petition submitted: 1 May 89

Oral argument: 2 Aug 89

Adjudged: AFFIRMED WITHOUT OPINION

Per Curiam: (Markey, Chief Judge, Newman and Archer, Circuit Judges)

Entered by Order: 28 Aug 89

Petition for Rehearing: 6 Sept 89

Adjudged: DENIED WITHOUT OPINION

Per Curiam: (Markey, Newman and Archer)

Entered by Order: 19 Sept 89

Issued as Mandate: 26 Sept 89

APPENDIX II

MERIT SYSTEM PROTECTION BOARD (MSPB)

Robert W. Wills,
Appellant

v.

Department of the Navy,
Agency

Docket No. DC07528710415-1

Robert V. Varnum, Esquire, Mehler, Franz, Conlon, Knapp, Phelan & Varnum, Washington, D.C., for the Appellant

Ralph E. Olson, Esquire, Washington, D.C. for the Agency

BEFORE: Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

ORDER: After full consideration, the Board DENIES the appellant's petition for review of the initial decision issued on October 18, 1988, because it does not meet the criteria for review set forth at 5 C.F.R. 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. 1201.113(b).

Order Date: 21 Feb 1989

APPENDIX III

MERIT SYSTEM PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Robert W. Wills,
Appellant,

v.

Department of the Navy,
Agency

Docket No. DC07528710415-1
Robert V. Varnum, Esquire, Washington, D.C., for Appellant
Ralph E. Olson, Esquire, Washington, D.C. for Agency

BEFORE: Joseph E. Clancy, Administrative Judge

INITIAL DECISION:

By Opinion and Order dated June 13, 1988, the Board remanded this case for further adjudication. See Wills v. Department of the Navy, 37 M.S.P.R.137, 141 (1988). A hearing was held concerning the timeliness of the initial petition for appeal, as well as the voluntariness of appellant's retirement.

For the reasons set forth below, the appeal is DISMISSED.

The background of this case is fully set forth in the Board's remand decision and will not be repeated here. Briefly, however, appellant retired, effective September 11, 1985, two days before he was to be removed for unacceptable performance. Sometime during the next two weeks, appellant received a copy of a Standard Form 50(SF50) which noted that he had retired after receiving a decision to separate him for unacceptable performance. On June 18, 1987, more than twenty-one months after his retirement, apellant filed a petition for appeal claiming that his retirement had been involuntary.

In remanding this case, the Board directed that a determination be made regarding the existence of good casue for waiver of the regulatory time limit for appeal. The Board also stated that, if good cause was shown, appellant was "entitled to a hearing on whether appellant assumed that he would receive an SF50 that did not refer to the

decision to remove him and whether the agency had reason to know that the appellant was relying on that erroneous assumption." See Wills v. Department of the Navy, 37 M.S.P.R. at 141-2.

There is no dispute that, following the submission of appellant's written reply, prepared by his attorney, to the notice proposing his removal, appellant had a conversation on August 7, 1985 with March Price, an Employee Relations Specialist. At that time, the question of retirement was discussed, and Ms. Price informed appellant that a voluntary retirement was not appealable to the Board. Appellant intended to appeal his removal, if the dicision on the proposed action was adverse to him. Their discussion ended with appellant's stated intention to retire the day after his removal, thereby perserving his appeal rights. Neither appellant nor Ms. Price could recall any discussion regarding remarks on any SF50.

Appellant testified that after he received the agency's decision directing his separation effective September 13, 1985, he intended to appeal the action, and therefore still planned to retire as of September 14, 1985. He also testified, however, that after discussing the matter with his wife, he decided to "preserve his record" and "leave without a fight". He then informed the agency that he wished to retire effective September 11, 1985, and, on that date, went through check-out procedures, ending with a review of his retirement file with Nancy Wyrick, another Employee Relations Specialist. Again, neither appellant nor Ms. Wyrick could recall any discussion regarding adverse remarks on the SF50.

Following his receipt of the SF50 sometime between September 17, 1985 and September 25, 1985, appellant wrote letters to two members of congress, seeking support and guidance. Approximately twenty months later, appellant received a copy of a letter from the Office of Personnel Management (OPM) to one

of those members. That letter suggested that appellant could submit an untimely appeal to the Board concerning his alleged involuntary retirement, together with an explanation of the delay in filing. Appellant subsequently retained the services of another attorney, and submitted his appeal.

An appeal to the Board must be submitted within twenty days following the effective date of the action being appealed. See 5 C.F.R. 1201.22. The time limit may be waived if an appellant establishes the existence of good cause for an untimely filing. See 5 C.F.R. 1201.12, 1201.22(c); Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184 (1980). One important factor for consideration is whether the appellant acted as a reasonably prudent person and exercised due diligence in discovering and pursuing a right of appeal. See Kotulak v. Department of Agriculture, 35 M.S.P.R. 111, 113 (1987); cf. Mason v. Department of Transportation, 32 M.S.P.R. 138, 141 (1987).

In the instant case, I find what appellant did not do, rather than what he did, to be of particular significance. After receiving the SF50 in question and believing himself to have been aggrieved, he did not contact the agency to protest or even question the agency's remarks on the document. Ms. Wyrick testified that the retirement package given to appellant contained several telephone numbers, including her own, for his information and contact for assistance. He also did not contact his attorney, an experienced advocate before the Board. Finally, he did not contact the Board, although the Regional Office's address, as well as a copy of the Board's regulations, were provided to appellant with the September 6, 1985 final agency decision. Contact with any one of these sources would have provided appellant with information concerning a potential right to appeal an alleged involuntary retirement.

Despite the existence of the logical sources of information cited above, appellant chose to pursue congressional "support and guidance" in seeking redress. I find that

appellant's choice was not one that a reasonably prudent person, truly believing himself to have been aggrieved by an agency's action, would have made in an effort to diligently pursue relief. See Kotulak v. Department of Agriculture, 35 M.S.P.R. at 114; cf. Smith v. Navy, MSPB Docket No. HQ7121804 (August 10,1988). I therefore find that appellant failed to establish good cause for the lengthy delay in filing his petition for appeal, and that it is appropriate for dismissal on that basis.

The facts and circumstances concerning the question of the voluntariness of appellant's retirement, are, to a great extent, intertwined with those concerning the timeliness issue. Accordingly, notwithstanding my finding above that the appeal should be dismissed as untimely, I will adress the question of Board jurisdiction in this matter.

It is unclear whether, at the time he retired, appellant assumed that he would receive an SF50 that did not refer to the agency's decision to remove him. It is clear,

however, from the testimony of appellant, Ms. March and Ms. Wyrick, that appellant never expressed such an assumption to anyone at the agency, nor was the subject ever broached by appellant. In addition, Ms. March and Ms. Wyrick both testified that, had appellant indicated such a belief, they would have corrected his erroneous assumption.

Appellant opined that, notwithstanding the fact that he had not communicated his erroneous assumption to any agency personnel, the agency should have known of his desire to "preserve his record". He argued that this "knowledge" was imparted to the agency by virtue of his disagreement with the merits of the agency's basis for his proposed removal, as set forth in his response to the proposal notice. I am not persuaded by this theory, however, and I find that the agency did not have reason to know that appellant was relying on an erroneous assumption concerning any remarks on his SF50. See Wills v. Department of the Navy, 37

M.S.P.R. at 141-2. I further find that appellant's choice to retire was an informed one, and was freely made. See Covington v. Department of Health and Human Services, 750 F.2d 937, 953 (Fed. cir. 1984). Such a voluntary retirement is not a matter within the jurisdiction of the Board. See 5 C.F.R. 752.401(c)(3); Myslik v. Veterans Administration, 2 M.S.P.R. 69, 71 (1980).

DECISION

The appeal is hereby DISMISSED.

FOR THE BOARD:
Signed by Administrative Judge:
Joseph E. Clancy

AFFIDAVIT OF SERVICE

In response to Rule 28.5(c) and in compliance with Rules 19.3 and 21 of the Supreme Court, I, Robert W. Wills, hereby certify that on this 13th day of November, 1989 I filed with the Clerk's Office of the Supreme Court of the United States forty (40) copies of a Petition for Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit involving Case No. 89-3214. I am a Pro Se Petitioner. On this day, I personally hand delivered this petition of forty copies to the Clerk's office of the U.S. Supreme Court for docking. I further certify that on the same date I deposited three (3) copies of the same petition in a United States post office, with first-class postage prepaid, to the Respondent appearing before the U.S. Court of Appeals for the Federal Circuit as listed below. Further, I deposited one (1) copy by mail to other parties for information as listed below:

Affidavit continued:

RESPONDENT BEFORE THE COURT: (Three copies

Margaret Baskette, Esq.
Department of Justice/Civil Division
550- 11th Street, N.W.
Washington, D.C. 20580

ALSO: (Three copies)

David M. Cohen, Director
Commercial Litigation Branch/ Civil Div
Department of Justice
Attn. Classification Unit
2nd Floor Todd Building
Washington, D./C. 20530

OTHER: (One Copy each)

Clerk, U.S. Court of Appeals for the
Federal Circuit
717 Madison Place, N.W. ,
Washington, D.C. 20439

Others Continued:

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Merit Systems Protection Board
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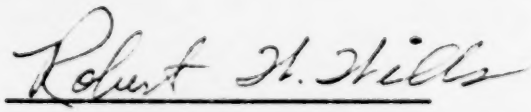
Washington, DC 20361-0002



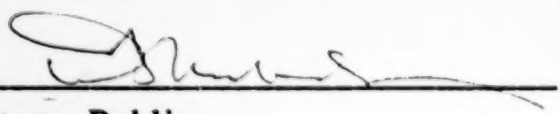
ROBERT W. WILLS,
Pro Se Petitioner

NOTARY PUBLIC

STATE OF VIRGINIA:

Fairfax County, to wit:

I, D. J. MALONEY, a Notary Public in and for the jurisdiction aforesaid, do certify that Robert W. Wills, whose name is subscribed above, signed and acknowledged his signature in my presence, and further stated that the statements made are true to the best of his knowledge and belief.



Notary Public

My commission expires: 3-23-93